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91-528

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1991

MATE PICINIC,

Petitioner,

vs.

SEATRAIN LINES, INC., SEATRAIN REALTY CORP., and JACKSON TANKER CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

KENNETH HELLER
Attorney for Petitioner
335 Broadway, Suite 614
New York, New York 10013
(212) 962-6085

Dick Bailey Appellate Printers ► Tel.: 1-800-564-4918 ◄
(212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848
Fax Number: (718) 273-8031

QUESTIONS PRESENTED

Was petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the Constitution violated by the dismissal of his case, with prejudice and without a determination of the merits of his case, because of his attorney's failure to file a certain affidavit in Court?

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OPINIONS BELOW

Mate Picinic seeks certiorari to review the Memorandum Decision and Orders of the Supreme Court of the State of New York, Appellate Division, First Department, officially reported at __A.D.2d__; 564 NYS 2d 139 (1st Dept. 1991) (Appendix A) and unreported (Appendix B).

The decisions and orders of the lower court are not officially reported and are reprinted at Appendices C and D.

JURISDICTION

The Order of the New York State Supreme Court, Appellate Division, First Department was entered on January 8, 1991. It is reported at 564 NYS 2d 139. This order affirmed an order of the Supreme Court, New York County (Helen Freedman, Justice), entered November 16, 1989, which granted respondents' motion to dimiss the complaint for failure to appear at a certain oral deposition before trial.

By order entered March 26, 1991, the said Appellate Division denied petitioner's motion for renewal and reargument thereof, or, in the alternative, for leave to appeal to the New York Court of Appeals.

Petitioner's motion for leave to appeal to the New York Court of Appeals from the said order of the Appellate Division was denied by the New York Court of Appeals by order dated June 27, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of The Fourteenth Amendment to the Constitution of the United States reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 3126 of the Civil Practice Law and Rules of New York reads as follows:

> If any party, or a person who at the time a deposition is taken or an examination or inspection is made, is an

officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to notice duly served, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

STATEMENT OF THE CASE

Petitioner, a longshoreman, sustained severe permanent injuries on April 28, 1980, while employed at Port Seatrain, New Jersey. He was found to be totally disabled by the Department of Health, Education and Welfare, the Social Security Administration and his union, The International Longshoremen's Association. From the time of the accident to the present he has been unable to perform any remunerative labor. To date, his estimated wage loss

is in the neighborhood of $1,000,000. Of course, this is in addition to the pain and suffering he has sustained from his disabilities.

Petitioner commenced an action under the General Maritime Law against the respondents, the owners of the vessel on which he was injured. The action was brought in the Supreme Court of the State of New York, pursuant to the "Saving to Suitors" clause, Title 28 USC, Sec. 1333. Thereafter, the case was assigned to Justice Helen Freedman.

By order dated September 7, 1989, Justice Freedman directed petitioner to appear for an oral examination before trial on or before October 16, 1989 (Appendix C). Later that month, on September 29, 1989, petitioner's attorney, determining that he would be actually engaged in a trial of another case for the time allotted for petitioner's said deposition, prepared an affirmation of actual engagement (Appendix F). Unfortunately, due to law office failure, this affidavit was never filed with the court.

Petitioner moved to reargue the September 7 discovery order, by motion made on October 11, 1989, which was before his time to appear for a deposition had run. The motion to reargue was returnable October 20, 1989 but, because petitioner's attorney was still on trial, the return date was adjourned to November 3, 1989. On that date, the attorney, his other trial concluded, wrote the respondent's attorney and offered to produce petitioner for deposition later that month, with various physical examinations to follow soon thereafter (Appendix G).

Meanwhile, on November 1, 1989, respondents had cross-moved for dismissal, making the cross-motion returnable November 3. Justice Freedman granted this motion and dismissed the complaint (Appendix D). That decision was affirmed by the Appellate Division (Appendix A,B). Petitioner's motion for leave to appeal from that decision was denied by the Court of Appeals of New York (Appendix E).

ARGUMENT

A WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A STATE COURT HAS THE POWER, CONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES, TO DISMISS A PRESUMABLY VALID MARITIME ACTION, WITH PREJUDICE, BUT WITHOUT A TRIAL OR OTHER HEARING ON THE MERITS, BECAUSE OF LAW OFFICE FAILURE.

This Court has ruled on cases arising in the federal courts in which plaintiffs have had their cases dismissed because of failure to comply with discovery orders. In *Societe Internationale, etc v. Rogers*, 357 US 197, 78 S.Ct. 1087 (1985), the Court held that the provisions of Rule 37 of the Federal Rules of Civil Procedure, which grants the District Court power to dismiss in the event of noncompliance with discovery orders, "must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law ***(357 US at 209, 78 S. Ct. at 1094)."

At the cited pages, the Court went on to state that the provisions of Rule 37 must be examined in the light of the Court's opinions in *Hovey v. Elliott*, 167 US 409, 17 S. Ct. 841 (1897) and *Hammond Packing Co. v. State of Arkansas*, 212 US 322, 29 S. Ct. 370.

In *Hovey v. Elliott, supra*, this Court held that a state court denied a defendant due process when his answer was stricken, thereby leading to a judgment by confession without a hearing on the merits, because of the defendant's refusal to obey a court order pertinent to the action.

The Court in *Societe Internationale, supra*, pointed out that the *Hovey* holding was modified by *Hammond*

Packing Co., supra, which somewhat weakened *Hovey's* effect.

In discussing both the *Hovey* and the *Hammond* decisions, the Court in *Societe Internationale, supra*, leaned rather heavily in the direction of *Hovey*. The Court stated (357 US at 210, 78 S. Ct. at 1095):

> "These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the Hammond case might well falter under such circumstances.*** Certainly substantial constitutional questions are provoked by such action."

Societe Internationale, supra, was cited by this court, with approval, in *Logan v. Zimmerman Brush Company*, 455 US 422, 429, 102 S. Ct. 1148, 1154 (1982).

In the instant case, petitioner was unable to comply with Justice Freedman's discovery order because his attorney was engaged in a prolonged trial at that time. If the attorney's affirmation to that effect had been properly filed it is inconceivable that the complaint would have been dismissed.

Additionally, it should be noted that petitioner, as a maritime worker, is a ward of the admirality and, as such, is entitled a "peculiar protecting favor and guardianship." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246, 63 S. Ct. 246, 251 (1942).

It is apparent that the petitioner has been deprived of his day in Court because of an inadvertent error by his attorney. This does not accord with due process, or at least this Court may so conclude.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD ISSUE

Respectfully submitted,

KENNETH HELLER
Attorney for Petitioner
335 Broadway, Suite 614
New York, New York 10013
(212) 962-6085

Kupferman, J.P., Sullivan, Milonas, Rubin, JJ.

41358 Mate Picinic,

Plaintiff-Appellant,

-against-

Seatrain Lines, Inc., et al.,

Defendants-Respondents.

Order, Supreme Court, New York County (Helen Freedman, J.), entered November 16, 1989, which, *inter alia*, granted defendants' motion to dismiss the complaint pursuant to CPLR 3126, unanimously affirmed, without costs.

The complaint in this negligence action arising out of an injury sustained by plaintiff, a longshoreman-checker, on April 28, 1980, while he was working at Port Seatrain in Weehawken, New Jersey, was dismissed upon plaintiff's failure to comply with court-ordered discovery and after plaintiff had been given one final opportunity to comply with defendants' discovery requests. The record amply supports the IAS court's determination that plaintiff had frustrated defendants' attempts to conduct discovery and disobeyed its September 7, 1989 conditional order of dismissal, which plaintiff had not appealed. Instead of adhering to the court-ordered schedule directing him to submit to an examination before trial with an interpreter, provide CT scans and appear for a physical examination, plaintiff waited until some of the court-ordered dates had passed and then sought reargument. Since plaintiff was well aware of the terms of the conditional order of dismissal, and no satisfactory excuse has been proffered for his non-compliance, dismissal of the complaint was proper. (*Zletz v. Wetanson*, 67 NY2d 711, 713). We note that since the commencement of this action in 1983, almost no discovery has taken place.

We have examined plaintiff's other contentions and find them to be without merit.

M-4332&
M-4441 *Mate Picnic v. Seatrain Lines, Inc., et al.*
Motion to file oversize reply brief granted.

Cross-motion to strike appellant's brief and for other relief granted only to the extent of striking material not properly before the Court and otherwise denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: January 8, 1991

s/ Francis X. Galdi
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 26, 1991

Present - Hon. Joseph P. Sullivan, Justice Presiding
E. Leo Milonas
Theodore R. Kupferman
Israel Rubin, Justices

Mate Picinic,

Plaintiff - Appellant,

-against-

Seatrain Lines, Inc., et al.,

Defendants-Respondents.

Plaintiff-appellant having moved for renewal and reargument of, or, in the alternative, for leave to appeal to the Court of Appeals from, a decision and order of this Court entered on January 8, 1991 (Appeal No. 41358),

And defendants-respondents having cross-moved for imposition of sanctions on plaintiff,

Now, upon reading and filing the papers with respect to said motions, and due deliberation having been had thereon,

It is ordered that said motion and cross-motion be and the same are denied in their entirety.

ENTER:
Clerk

SUPREME COURT : NEW YORK COUNTY
CIVIL TERM
IAS : PART 30

MATE PICINIC,

Plaintiff,

-against-

SEATRAIN LINES, INC., SEATRAIN REALTY CORPORATION AND JACKSON TANKER CORPORATION,

Defendants.

HELEN E. FREEDMAN, J.:

Plaintiff and defendants move and cross move alternatively to strike each other's pleadings pursuant to CPLR §3126(3) for failure to comply with court orders.

This is an action for personal injuries allegedly sustained by the plaintiff, a longshoreman, while unloading cargo on defendants' property in April 1980. Since the action was commenced in 1983, virtually no discovery has taken place. Prior to 1987, motion practice by both sides and the bankruptcy by one of the defendants delayed discovery.

In a December 1987 preliminary conference, Justice Arthur Blyn ordered plaintiff to supply CT Scans, appear for physical and psychiatric examinations and submit to examinations before trial. Pursuant to this order, discovery was to be completed within sixty (60) days and a note of issue filed by July 31, 1988. Plaintiff's attorney

served a notice for the EBT, but did not agree to arrange for an interpreter familiar with plaintiff's Yugoslavian dialect. Since the EBT could not be conducted without such an interpreter, it was never held. Each time defendants suggested the name of an employee to ask to appear for a deposition, plaintiff rejected the employee as unsuitable. When defendants did not agree to plaintiff's unilateral offer to appear for a physical examination prior to the EBTs, plaintiff deemed the physical examination waived.

After Justice Blyn's retirement, the case was reassigned to this Court which granted plaintiff a stay of discovery until September 1, 1988 so that plaintiff could perfect his appeal of Justice Blyn's order. Plaintiff then made a recusal motion which was denied and subsequently appealed. Neither the appeal of Justice Blyn's order nor the appeal of the recusal motion was ever perfected and to date, discovery remains at a standstill.[1]

Section 3126(3) of the CPLR provides in part that if a party refuses to obey an order for disclosure, the court "may make such orders with regard to the failure or refusal as are just among them: ...dismissing an action or any part thereof...". Plaintiff's attorney's course of conduct in this case had frustrated the efforts of both the Court to move the case to trial and the defendant to conduct discovery. His series of unperfected appeals of each court order and requests for adjournments and stays resulted in numerous delays. He has shown both the defendants and Court an unwillingness to cooperate.

The alleged accident occurred nine (9) years ago and no EBTs of fact witnesses or the plaintiff have been taken. It may be impossible for defendant to even locate fact witnesses at this point. Even if such witnesses would be found, their recollection of the incident would be hazy. Where the defendants have been severely prejudiced by the

(1) On September 5, 1989, the Appellate Division dismissed all of plaintiff's appeals.

dilatory tactics of the plaintiff, the complaint should be dismissed (see *Zletz v. Wetanson*, 67 NY2d 71, 490 NE2d 852, 499 NYA2d [1986]).

However, it must be acknowledged that some of the delays were occasioned either by the bankruptcy of defendants or by appeals taken by defendants from an entry of a default judgment against them. For that reason, the Court will give plaintiffs one more chance to comply with discovery orders on condition that $1,000 be paid to defendants' law firm on or before October 16, 1989.

Additionally plaintiff shall appear for an EBT on or before October 16, 1989 with a Yugoslavian interpreter to be paid for by defendants and CT Scans shall be furnished before that date. At least, one physical examination shall be conducted on or before October 23, 1989 with the others to be completed by November 15, 1989. The discovery shall be completed by December 31, 1989 and the matter shall be placed on the trial calendar by February 28, 1990. Failure to comply with any of the above directions shall result in the striking of the complaint and dismissal of the action.

The foregoing constitutes the decision and order of the court.

Dated: September 7, 1989

s/ H.E.F.
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. HELEN E. FREEDMAN

Justice.

Mate Picinic,

-against-

Seatrain Lines, Inc., etc.

The following papers numbered 1 to 11 read on this motion to Reargument

Notice of Motion/Order to Show Cause - Affidavits - Exhibits 1-4 X Motion.....1-4
Answering Affidavits.....5-8Replying Affidavits.....9-11

Upon the foregoing papers it is ordered that this motion by plaintiff to reargue this court's decision of September 7, 1989 is denied and the defendants cross-motion to dismiss the complaint with prejudice is granted. On September 7, 1989, this court ordered that the parties commence discovery and set up a schedule for all to follow. Rather than adhere to the schedule, plaintiff waited until the court ordered dates had passed and then moved to reargue the decision. Since the September 7 decision clearly states that failure to comply with the new discovery schedule will result in dismissal, the complaint is now dismissed. The foregoing constitutes the decision and order of the court.

11/16/89 s/ H.E. Freedman

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of June A.D. 1991

Present, HON. SOL WACHTLER, Chief Judge, presiding.

1-10 Mo. No. 534
Mate Picinic,

Appellant,

v.

Seatrain Lines, Inc., et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW

MATE PICINIC,

Plaintiff,

-against-

SEATRAIN LINES INC., SEATRAIN REALTY CORP., and JACKSON TANKER CORP.,

Defendants.

AFFIRMATION OF ACTUAL ENGAGEMENT

Index No. 16220/83

KENNETH HELLER, an attorney at law in the State of New York, under penalty of perjury, hereby affirms:

That he is the attorney for the plaintiff, that he is familiar with the facts herein and all the previous pleadings and proceedings, and that he submits this affirmation of actual engagement in support of his application to adjourn the discovery dates set by the September 7, 1989 order of Justice Helen Freedman (Exhibit 1).

Affirmation will be actually engaged in trial commencing October 2, 1989 before Justice Michael Dontzin in the case of *Public Administrator of the County of New York, as Administrator of the Estate of Andrew J. Milam, Deceased, Plaintiff, v. Gibson & Cushman of New York, Inc., Defendant*, Index No. 16220/83, Cal No. 89 L02985.

This is serious maritime personal injury action. Deponent believes the trial will require three to four weeks

trial time.

The September 7, 1989 discovery order requires plaintiff Picinic to appear for deposition, physical examinations, and to furnish other discovery during the month of October, 1989, while deponent is actually engaged in trial.

Deponent respectfully requests that all discovery dates set by Justice Freedman in her order be adjourned one month, due to his actual trial engagement.

WHEREFORE, it is respectfully requested that plaintiff's application to adjourn the discovery dates set in Justice Freedman's September 7, 1989 order for one month be granted in all respects.

Affirmed this 29th
day of September, 1989.

KENNETH HELLER

November 3, 1989

Lawlor & Caulfield
80 John Street
New York, New York 10038

Attn: David Heller, Esq.

Re: Picinic v. Seatrain Lines, Inc.
Index No. 16200/83
File No. 1395

Dear Mr. Heller:

We are prepared to produce plaintiff for deposition on November 29, 1989, at 10:00 A.M., at the Supreme Court, Room 315. You will require an interpreter of the Croatian-Primorski dialect.

We expect you to produce on that date a person or persons with knowledge of the facts for the deposition of defendants.

Defendants will be required to produce those documents which were itemized in our original notice of deposition. A copy of same is enclosed herein.

We are prepared to produce the plaintiff for a neurological and psychiatric examination on December 4, 1989, at 10:00 A.M., at our offices. We remind you that a formal Notice of Physical Examination was served on you on March 11, 1987.

We will produce plaintiff for a physical examination by an orthopedist on December 6, 1989, at 10:00 A.M., at the doctor's office.

Kindly confirm these arrangements with my office.

There is no record of any C.A.T. scans.

Very truly yours,

Kenneth Heller